

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

76-1111

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**United States Court of Appeals
For the Second Circuit**

THE UNITED STATES,

Appellees,

v.

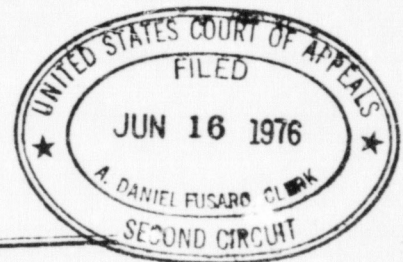
BEN LINDSAY,

Defendant-Appellant

*On Appeal From The United States District
Court For The Southern District Of New York*

APPELLANT'S BRIEF

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1. 18 U.S.C.A. Section 371
2. 18 U.S.C.A. Section 922 (a) (1)

STATEMENT OF ISSUE

Appellant Contends that the Indictment herein should be Dismissed because the Evidence was legally Insufficient to Sustain a Finding that he conspired with Rodrey Blume and others to violate Title 18, United States Code, Section 371 and 922 (a) (1).

Appellant's conviction was not established beyond a reasonable doubt in view of the defined doubt and uncertainties which exist in this case.

PRELIMINARY STATEMENT

BEN LINDSAY appeals from a judgment of conviction entered on December 19, 1975 in the United States District Court for the Southern District of New York, after trial before the Honorable Thomas P. Griesa, United States District Judge, without a jury.

Count I of Indictment 74 Cr.1041 charged BEN LINDSAY and RODNEY BLUME, and others unknown to the Grand Jury with conspiracy to violate Title 18, United States Code, Section 922 (a) (1); whereby the defendants, not being licensed importers, manufacturers or dealers, willfully and knowingly engaged in the business of dealing in firearms and ammunition.

In pursuance of the conspiracy Indictment 74 Cr.1041 alleged certain overt acts which included a meeting, conversations, and the transfer of a .38 caliber revolver and forty-five dollars (Title 18, United States Code, Section 371).

At his arraignment on Indictment 74 Cr.1041 defendant BEN LINDSAY entered a Not Guilty plea. Prior to trial co-defendant RODNEY BLUME pleaded guilty to Indictment 74 Cr.1041 and agreed to cooperate and assist the government by becoming a government witness against BEN LINDSAY.

Subsequent thereto, the case proceeded to trial, without a jury, before the Honorable Thomas P. Griesa, United States District Judge on December 19, 1975. After trial defendant BEN LINDSAY was found guilty as charged. The defendant

BEN LINDSAY was thereafter sentenced on February 10, 1976 pursuant to 18 USC 3651 to a term of three years and six months, of which six months is to be served in a jail type institution with execution of the remainder of the sentence suspended.

On February 17, 1976, the defendant-Appellant served and filed a Notice of Appeal with the United States Court of Appeals For The Second Circuit. A motion was thereafter made for an extension of time to file the brief and appendix. This motion was granted and the defendant-appellant time was extended to June 7, 1976 to file the brief and appendix on appeal. On June 7, 1976 the appendix was filed as ordered and another motion was made for a further extension of time until June 16, 1976 to file the brief. This motion was granted.

STATEMENT OF FACT

RODNEY BLUME was the principal witness on the government direct case. He testified that he had been convicted in the trial of United States vs. Charles Rumph, etc., which essentially involved a conspiracy to deal in firearms. He was again indicted in this case with defendant BEN LINDSAY (74 Cr. 1041). Rodney Blume pleaded guilty to this second indictment and he was later sentenced as a youth on both convictions to a maximum of six years incarceration (TR. P. 8).

On the government direct case Rodney Blume testified that he met Robert Preston at his (Rodney Blume) girlfriend's house. During a conversation Rodney Blume stated that Robert Preston asked him if he knew anyone who had guns. Rodney Blume told Robert Preston that he did and he told Robert Preston to meet him the next day at his girlfriend's house at 145th Street and Willis Avenue (TR. P. 12). When Rodney Blume and Robert Preston met the next day Robert Preston asked Rodney Blume whether he had done anything for him the night before and Rodney Blume told him, yes, he did. They then went downstairs and left the house and got into a car. After entering the car Rodney Blume testified that he was introduced to two government agents who were waiting in the car. Rodney Blume stated that at this time he did not know that Robert Preston and the two men were government agents. They then proceeded in the car to 168th Street and Franklin Avenue where Rodney Blume and Robert Preston got out the car and met a person named Moms. Rodney Blume stated that he asked Moms whether her husband had the things which he asked for the night before

and moms responded by saying, yes, he did. Rodney Blume then asked Moms whether her husband was home and she told him that her husband was in the bathroom washing. Rodney Blume then went into the bathroom where he allegedly asked defendant Ben Lindsay whether he had the gun with him. Later they met Moms and bidding for the gun occurred. During the bidding Moms looked at him and said, "Let Peewee have the gun, we promised it to him." Before leaving Rodney Blume stated that there was a conversation. During the conversation Moms talked about two .38 pistols which she said she would not sell because her sons had died with them and under the circumstances she would never sell them. Rodney Blume testified that at this time they left and he along with Robert Preston and Ben Lindsay returned to the car where the government agents were waiting (TR. P. 21). At this point Rodney Blume stated that he got in the agent's car and Robert Preston got in the car with defendant Ben Lindsay. Afterward they drove to Shakespeare Avenue in the Bronx. When they arrived at Shakespeare Avenue Rodney Blume stated that he remained in the agent's car and defendant Ben Lindsay got out of his car and went upstairs for five or ten minutes. When the defendant Ben Lindsay returned to the car and got in Robert Preston allegedly called him (Rodney Blume) to come up to defendant Ben Lindsay's car. Rodney Blume stated that when he got up to the car defendant Ben Lindsay handed him a gun (TR. P. 23). Rodney Blume stated further that after he took the gun Robert Preston told him to go back and get the money. After receiving the money from an agent Rodney Blume

said he went back to defendant Ben Lindsay's car. At this time Rodney Blume stated that he had a ten dollar bill which Robert Preston could not change. Rodney Blume then stated that defendant Ben Lindsay gave him change for one of the tens and he thereafter returned to the agent's car. Sometime thereafter they left this area and proceeded to 168th Street and returned to the after hour place to see if Moms had made the connection with certain persons from whom they were to get guns. Moms informed them that she had not made the connection. Rodney Blume stated that defendant Ben Lindsay was not with them during their conversation with Moms (TR. P. 27). At the conclusion of his testimony Rodney Blume testified on cross-examination that prior to the evening when he received the gun and spoke to Ben Lindsay he did not know defendant Ben Lindsay (TR. P. 27).

Detective James Rodriguez was the second witness to testify on the government direct case. He testified that on May 6, 1974 at approximately 5:30 p.m. he was working as an undercover agent with Special Agent Ray Martinez and Robert Preston, a confidential informant. During the evening detective Rodriguez stated they went to 145th Street and Willis Avenue in the Bronx. When they arrived at 145th Street and Willis Avenue Robert Preston got out of the car and went for a walk to meet some people (TR. P. 29). When he returned he had an man with him who identified himself as Rodney Blume. At this point detective Rodriguez testified that Rodney Blume

told them that he knew a lot of people that were dealing in guns and that they could supply guns. Detective Rodriguez further testified that Rodney Blume told them they had to go to a location on Franklin Avenue where he knew a guy named Ben who could supply the guns. After arriving at Franklin Avenue they parked. In the car at this time was Special Agent Ray Martinez, Robert Preston and Rodney Blume. Rodney Blume got out of the car at this point and walked across the street to a store front where he remained for a short period of time and returned with Ben Lindsay (TR. P. 31). At this point Rodney Blume walked over to the car where Detective Rodriguez, agent Martinez and Robert Preston was parked. At this time Rodney Blume came over to the car and gave Agent Martinez a revolver through the window which he said cost \$45.00. Agent Martinez gave Rodney Blume \$50.00. From this amount Ben Lindsay received \$45.00 and Rodney Blume received \$5.00 for his services. (TR. P. 33). Shortly thereafter detective Rodriguez testified that they left the location and met with the back up team to whom they gave the gun.

ROBERT L. PRESTON, a confessed convict of several crimes was the third witness to testify on the government direct case. Robert Preston testified that he had previously been convicted of several crimes and in May, 1974 he was working as a confidential informant for the District Attorney's Office. He stated that on May 5, 1974 he had a telephone conversation

with Rodney Blume (TR. P. 41). During the telephone conversation Robert Preston stated that he told Rodney Blume that he wanted to buy some guns and he asked Rodney Blume whether he could supply him. Rodney Blume responded by telling him that he had a friend who could supply them. Thereafter Robert Preston and Rodney Blume agreed to meet the next day at 6 o'clock (TR. P. 42). At 6 o'clock the next evening Robert Preston and Rodney Blume met at 145th and Willis Avenue at Charlie's house. At the time Robert Preston testified that he was accompanied by detective Rodriguez and Special Agent Martinez. In the apartment was Charlie and a woman named Clarita. While in the apartment Clarita made a telephone call to Rodney Blume (Peewee) and during the telephone conversation Robert Preston told Rodney Blume that he was interested in buying some guns. Rodney Blume responded by telling Robert Preston he could supply the guns. They then agreed to meet at 6 o'clock the next day. When they met the next day Rodney Blume allegedly told Robert Preston that he could only guarantee him one .38 (TR. P. 43). Rodney Blume then allegedly said that on the night before Ben had a .25 and a 357., but he was not sure he still had them. After this conversation Robert Preston and Rodney Blume left the apartment and returned to the car where detective Rodriguez and special agent Martinez were waiting. After introducing Rodney Blume to detective Rodriguez and special agent Martinez they proceeded to 168th and Franklin where they were suppose to meet Ben. When they

arrived at Franklin Street Robert Preston stated that they approached Ben standing on the sidewalk. At this time Rodney Blume allegedly introduced Robert Preston to Ben Lindsay. After the introduction Ben Lindsay allegedly told Robert Preston and Rodney Blume that he had gotten rid of everything but a .38. Afterward they went inside where a lady named Moms joined in the conversation wherein a sawed off shotgun and two 38s were discussed. (TR. P. 44). Rodney Blume told Robert Preston that Moms was a good friend of his and Moms then asked Ben Lindsay what was she going to do for them. (TR. P. 45). According to Robert Preston - Ben Lindsay then said that all he had left was a .38 and he was going to sell it. Then Moms mentioned something about a .32 when another fellow said he had already spoken for the .32. At this time Robert Preston testified some bidding took place among the persons in the room. (TR. P. 45). Present in the room at this time were Rodney Blume, Ben Lindsay, Robert Preston, Moms and the other man. Ben Lindsay told Moms that she could help Robert Preston out. Then a conversation between Moms, Rodney Blume and Ben Lindsay allegedly took place about some guns some one had brought from North Carolina.

POINT I

The Evidence adduced at the Trial below was insufficient to establish that the Defendant-Appellant Ben Lindsay conspired with Rodney Blume and Others to Deal In Firearms in Violation of Title 18 United States Code, Section 371 and 922 (a) (1).

The government concedes in this case that there was only a single sale and transfer of, a single hand gun, to wit, a .38 caliber revolver. The relevant Statute involved is Title 18 United States Code, Section 371 which provides:

If two or more persons conspire either to commit any offense against the United States, or defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

The other pertinent statutory provision in this case is Title 18 United States Code, Section 922 (a) (1) which provide:

- (a) It shall be unlawful -----
 - (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.....

It is important to note that under Section 922 (a) (1)

the government could not have convicted the defendant-appellant of the substantive crime of dealing in firearms since there was only the single sale or transfer of a single hand gun. Faced with this problem on the facts of this case, the government elected to charge and convict the defendant-appellant of conspiracy to violate the firearm statute. (TR. P. 104, 105), United States V. Kraase, 484 F 2d 549 (1973)

The essential elements of a criminal conspiracy are an agreement by two or more persons to commit an offense against the United States and an overt act by one of them in furtherance of the conspiracy. United States V. Isaacs, 516 F 2d 409 (1975). To conspire is to agree. The presence of an agreement is a primary requirement for the establishment of a conspiracy. United States V. Perez, 489 F 2d 51 (1973). This presupposes that the agreement must precede the commission of the overt act since the overt act is intended to advance the object of the agreement. Appellant Lindsay respectfully contends that the evidence presented in this case was insufficient to establish that he conspired with Rodney Blume and others to engage in the business of dealing in firearms. The evidence adduced revealed that Rodney Blume brought Robert Preston, a government informant to an after hours club where Appellant Lindsay was present. After Rodney Blume introduced Appellant Lindsay to Robert Preston there was a discussion wherein Rodney Blume asked Appellant Lindsay if he had any guns. (TR. P. 44). Appellant

Lindsay responded by saying that he only had a .38. Robert Preston testified that at this point they went inside the after hours club where they met a person called Moms and a discussion about a sawed off shotgun and two 38's took place. The record is barren as to whether Appellant Lindsay participated. Some time there-after they were joined by another male when some bidding commenced for the purchase of the gun (TR. P. 45). Rodney Blume testified that after the bidding Moms suggested that the gun should go to him (TR. P. 21).

It is submitted that this testimony from two confessed convicts does not reveal an agreement by Appellant Lindsay to engage in the business of dealing in firearms. Moreover the fact that bidding occurred negates a finding that there was a conspiracy to sell guns to the government agents. Admittedly, Appellant Lindsay spoke with Rodney and the government informant, Robert Preston at different times and places, however, the evidence taken in a light that is most favorable to the government fails to establish that Appellant Lindsay agreed with anyone to violate the law or commit a crime. Mere presence at the scene of a crime does not make one an aider and abetter, and "guilt cannot be established by mere association."

Ramirez V. United States, 363 F 2d 3,34 (9 Cir. 1966). The entire thrust of the government theory in this case is that Appellant Lindsay conspired with Rodney Blume and other government agents to deal in firearms and that the sale of one .38

ha lgun by Appellant Lindsay to Rodney Blume was an overt act in furtherance of the conspiracy.

In establishing that Appellant Lindsay was involved in a conspiracy to deal in firearms, the government is relying, without more, on conversations which occurred and the sale of one .38 caliber revolver to prove by circumstantial evidence Appellant Lindsay's guilt. It is well established that a conspiracy may be proved by circumstantial evidence and that to constitute an unlawful conspiracy no formal agreemt is necessary. Blumenthal V. United States, 158 F 2d 883, 889 (9 Cir 1946), aff'd 332 US 539, 685. Ct. 248, 92 L.ed. 154 (1957). An agreement constituting a conspiracy may be inferred from acts of the parties. United States V. Schroeder, 433 F 2d 846, 849 (8 Cir 1970), cert. denied, 400 U.S. 1024, 91 S. Ct 590, 27L. Ed. 2d 636 (1970). "The agreement may be shown if there be concert of action, all the parties working together understandingly, with a single design, for the accomplishment of a common purpose: Fowler V. United States, 273 F. 15, 19," Marino V. United States, 91 F. 2d 691, 694 (9 Cir 1937). Appellant Lindsay respectfully submits that the evidence in this case does not permit the drawing of an inference that there was a common design or purpose to engage in the business of firearms. The facts clearly demonstrated that Appellant Lindsay had only one .38 handgun. It has been held that a person is engaged in the business of dealing in firearms if he has guns on hand for the purpose of sale or is ready and able to procure

them for the purpose of sale, to such persons as he may accept as customers. United States V. Jackson 352 F Supp 675 aff. 480 F 2d 927. Constructive possession of firearms exist when a person does not have actual possession of firearms but when such person knowingly has the power and the intention to exercise dominion and control over the firearms either directly or through others United States V. Craven, 478 F 2d 1329; United States V. Carmacho, 528 F 2d 464 (1976). It is crystal clear in this case that Appellant Lindsay did not have a supply of guns available, nor was proof presented to show that he had the power to procure or control weapons. Clearly, the conclusion reached by the Court below is not supported by the evidence. Under the circumstance, the Indictment herein should have been dismissed.

POINT II

The Defendant-Appellant's Guilt was not Established Beyond a Reasonable Doubt and Under the Circumstances the Indictment Herein Should Be Dismissed.

The testimony which the Court below relied on to convict appellant Lindsay came from the two principal witnesses for the government, Rodney Blume and Robert Preston who were both confessed convicts and assisting the government at the time of trial. Under the circumstances their testimony should have been received with caution. It is clear from the testimony presented irrespective of which government witness we believe the arrangements relating to the sale of a .38 were made and completed prior to any discussion about other guns. According to Robert Preston's testimony it is equally clear that when he first saw Appellant Lindsay after being introduced by Rodney Blume Appellant Lindsay stated that he only had one .38 which he was going to sell. Robert Preston's testimony also confirms that the only remaining thing to be done was the actual delivery and the payment of the purchase price. On the other hand if we accepted Rodney Blume's testimony we could reasonably infer that after he received the initial telephone call from Robert Preston who stated that he wanted to buy some guns Rodney Blume later spoke to Moms and learned that Appellant Lindsay had a gun. On the following night when he (Rodney Blume) spoke to Appellant Lindsay he

(Rodney Blume) discovered that Appellant Lindsay had a .38 for sale. At this point whether we believe Blume's or Preston's version of the facts there was a meeting of the minds as to what was being brought and sold. Actually Rodney Blume was acting as an agent for Robert Preston, hence, no conspiracy existed because it was never formed by formal agreement or acts. In passing it should be pointed to the Court that the trial judge refused to accept Appellant Lindsay's assertions that he had found the gun in a piece of furniture (TR. PP.104-5). Since Appellant Lindsay had no other guns it could be reasonably believed that he was telling the truth. In view of the foregoing it is obvious that this case abounds with uncertainties. Hence the doubt is defined. Under such circumstances, a reasonable doubt exist as to Appellant's guilt.

CONCLUSION

The Judgment of Conviction against Appellant Ben Lindsay should be reversed and the Indictment Herein Should Be Dismissed.

Respectfully submitted,

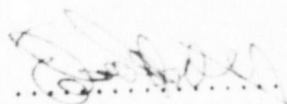
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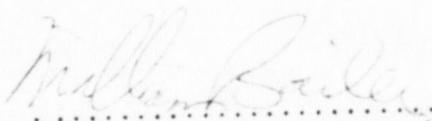
AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of June, 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon U.S. Atty. So. DRst. of N.Y. 3 the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 16 day of June 1976


.....
Edward Bailey


.....
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, ~~1978~~ 1977